FOR ARGUMENT.

Supreme Court, U. S.
FILED
MAR 24 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON, PETITIONER

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE HONORABLE THOMAS P. O'NEILL, Jr., SPEAKER; THE HONORABLE JIM WRIGHT, MAJORITY LEADER AND THE HONORABLE JOHN J. RHODES, MINORITY LEADER, OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AS AMICI CURIAE

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The Speaker of the United States House of Representatives, together with the Majority and Minority Leader, hereby appear as *amici curiae*, with the consent of the parties.[1]

INTEREST OF THE AMICI CURIAE

The question presented by this case, whether a Member of Congress may perform the functions of

[1] The letters of consent have been filed with the Clerk's Office.

his office in a vigorous, effective manner free from the apprehension of civil suit as a result, is of great concern to the House of Representatives as an equal component of the Legislative Branch of Government. Despite the fact that it involves a Senator, rather than a Representative, the issues which are presented are equally relevant to House Members and the ruling which emerges will be equally applicable to the activities of House Members.

The elected leadership of the House has a responsibility, as representatives of the body, to assure that the constitutional rights and privileges of the body are upheld, particularly where those rights and privileges are squarely and directly challenged, as they are in this dispute.

The suit attempts to premise a cause of action upon what the *amici* believe are vital and necessary legislative acts, including a speech on the Floor of the Senate, a press release to the Senate Service Department containing the text of the speech; dissemination of the information in the speech to constituents through newsletters and media appearances, and follow-up calls to executive agencies performed in the pursuance of the appropriations and oversight process. Any ruling which would permit these kinds of legislative acts to serve as a basis for suit would have a significant detrimental effect on the functioning of the House and its Members.

SUMMARY OF ARGUMENT

The Speech or Debate Clause of the United States Constitution provides, in pertinent part, that ". . .

Senators and Representatives . . . for any Speech or Debate in either House, . . . shall not be questioned in any other Place," U.S. Const. Art I, § 6. To effectuate the important constitutional purpose underlying the Clause—the maintenance of a vibrant and independent legislative branch—the Clause has not been read so narrowly as to only apply to words spoken in debate. Rather, it has been read to apply ". . . to things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1880).

This Court has recently stated that "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975), citing *Doe* v. *McMillan,* 412 U.S. 306, 314 (1973).

This absolute bar to interference "when it applies, . . . provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch". *Eastland* v. *United States Servicemen's Fund, supra* at 502–03.

Therefore, the question presented in this case is whether a United States Senator is within the "legitimate legislative sphere" in commenting to other Senators, the public and executive department officials on the utility and worth of certain publicly-funded research projects.

The *amici* contend that investigation and oversight of the legislative appropriations process and public comment related thereto is clearly the proper exercise

of: (1) the constitutional taxing and spending power of the Congress; and (2) the critical informing function of Congress and that therefore a Senator engaging in such activity must not be placed in peril of having to defend his motives and actions in the forum of a civil suit. To allow a civil suit of this nature to be maintained places every Federal legislator in potential jeopardy and will have precisely the intimidating effect sought to be protected against by the Speech or Debate Clause.

The Seventh Circuit Court of Appeals, in finding that the newsletters mailed to constituents by Senator Proxmire were privileged by the Clause, stated that "If the informing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this." *Hutchinson* v. *Proxmire,* 579 F. 2d 1027, 1033 (7th Cir. 1978). *Amici* submit that the obvious need for protection recognized by the Court of Appeals with respect to the newsletters should apply with equal force to each of the actions for which plaintiff-petitioner seeks to bring the Senator before the judiciary.

ARGUMENT

I. Informing the Public Is a Necessary and Proper Function of the Legislature and as Such It Is Consistent With the Purposes of the Clause for a Legislator To Be Protected in Carrying Out This Function

Dr. Hutchinson is, in part, seeking civil redress for wrongs allegedly committed by Senator Proxmire in the course of disseminating to his constituents and

the public at large his opinion of Dr. Hutchinson's government-funded research. The Senator's activity in presenting his views to the American public were divided by the Court of Appeals into three categories: (1) the press release of a speech delivered by the Senator on the Floor of the Senate; (2) newsletters distributed to the Senator's constituents; and (3) the television, radio and other interviews. *Hutchinson* v. *Proxmire,* 579 F. 2d 1027, 1031 (7th Cir. 1978).

Both the District Court and the Court of Appeals below held Senator Proxmire immune, under the Speech or Debate Clause, from any liability allegedly arising from the issuance and distribution of the press release.

The Court of Appeals also found that the Clause protected otherwise actionable material contained in any newsletter based partially on a finding that "The subject matter and the language of the newsletters make this case factually distinct from *Doe.* 579 F. 2d at 1034, citing *Doe* v. *McMillan,* 412 U.S. 306, 328–29 (Douglas, J., concurring).

However, the Seventh Circuit held that "any defamatory remarks made by Senator Proxmire in television, radio, and other interviews are not protected by absolute immunity." *Id.* The Court of Appeals reasoned that "[s]uch methods of reaching the public are generally not necessary to carry out representative's informing function and are more frequently used for political purposes." *Id.*

Amici present to this Court that all of the above mentioned activities engaged in by Senator Proxmire

were proper exercises of the Congressional "informing" function. The free flow of information, especially information concerning the administration of the government, between a legislator and his constituents lies at the very heart of the process of representative democracy. In realization of the need for an unimpaired flow of information to the citizenry, the Speech or Debate Clause, both in our Constitution and in its earlier English form, is intended to immunize legislators, such as Senator Proxmire, from precisely the type of legal peril to which petitioner-plaintiff seeks to expose him to in the instant case.

The necessity, in a representative form of government, for the legislators to communicate with their constituents was recognized as early as the Fourteenth Century. Commenting on the development of the English Parliament it has been said that:

> "Although taxation, legislation, and policy are the principle themes of parliamentary history in the Fourteenth Century we must not ignore the other valuable functions of parliament . . . representatives were expected to give a report of what had been accomplished at Westminster and were subjected to questions about their personal views on various . . . They regularly delivered reports at the guildhalls and enlightened their audiences on the great political issues of the day. . . . Gone was the age when the sheriffs or itinerant justices [both appointed by the royal administration] linked central to local

> government; this was now done by the knights and burgesses of parliament."

B. Lyon, A Constitutional and Legal History of Medieval England, 557–58 (1960).

The vitality within the American constitutional framework of the "informing" function of the Congress was demonstrated by Thomas Jefferson and James Madison in 1797. A grand jury had condemned the sending, by Congressmen, to constituents of newsletters chastizing the administration's foreign policy. Jefferson and Madison protested this action in a letter addressed to the Virginia House of Delegates. After claiming that to "give the will of the people the influence it ought to have, and [to provide the people with] the information which may enable them to exercise it usefully . . . that representatives . . . communications with their constituents should of right, as of duty also, be free, full, and unawed by any." Jefferson and Madison went on to protest that:

> "for the Judiciary . . . to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them . . . to put the representative into jeopardy of criminal prosecution, of vexation, expense and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation. . . ."

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8 The Works of Thomas Jefferson, 322–27 (Ford Ed. 1904).

The importance, within the American framework of government, of this legislative informing function was again recognized by Woodrow Wilson who in 1885 noted that:

> "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discusion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discused and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes and demands of public mind and shapes and demands of public opinion."

W. Wilson, Congressional Government, 303–304 (1885).

Likewise there has been judicial recognition, by this Court, of the important role played by Congress in informing the public. President Wilson's premise that "The informing function of Congress should be preferred even to its legislative function" was quoted with approval in *Tenney* v. *Brandhove,* 341 U.S. 367, 377 n. 6 (1951). In *Watkins* v. *United States,* 354 U.S. 178, 200 n. 3 (1957) it was noted that "From the earliest times in its history, the Congress has assiduously performed an 'informing function' ".

Justice Black concurred in the result reached by the four Justice plurality opinion in *Barr V. Matteo,* (360 U.S. 564 (1959), which held the Acting Director of the Office of Rent Stabilization immune from civil liability by virtue of a court-fashioned privilege enjoyed by an executive official. In his concurring opinion Justice Black noted that, while Mr. Barr might not have been required to issue press releases such as those at issue in that case, "it is clear that his action was forbidden neither by an Act of Congress nor by any governmental rule duly promulgated and in force". Justice Black went on to state that:

> "The effective functioning of a free government like our depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elec-

> tive or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important."

360 U.S. at 577.

Senator Proxmire, in seeking the widest possible dissemination among the American public of his analysis of certain federally funded research projects, appears to be engaging in precisely the type of legislator/public dialogue that has been recognized throughout history as being at the very core of representative government. The court below was correct in holding that the press release and the newsletters were protected by the Speech or Debate Clause. To distinguish the broadcast interviews on the basis of the nature of the medium (television and radio rather than written communication) is to impose an artificial distinction as to the methods of communication a legislator may use to fulfill the informing function. The Court of Appeals below, and petitioner-plaintiff before this Court, seeks to justify the different treatment of the more modern modes of communication as required by this Court's dictum in *United States* v. *Brewster,* 408 U.S. 501 (1972), that constituent newsletters, press releases, and speeches outside of Congress are "political in nature rather than legislative" and are therefore outside the parameters of the protection afforded by the Speech or Debate Clause, 408 U.S. at 512.

If the information being disseminated (a Senator's opinion as to the worth of certain government-funded research) is the type of information which it is proper for a legislator, in the exercise of his informing function, to communicate to his constituents and the public in general then the particular mode of communication used should not be relevant. The Court of Appeals has applied an improper test in basing a judgment on whether or not a particular communication is privileged by the Speech or Debate Clause on the form rather than the substantive content of the communication. *Amici* submit that the application of the Speech or Debate Clause to a particular communication was never intended to be contingent upon a particular medium of communication being employed or being avoided and that instead, it is more consistent with the purposes and history of the Clause, for any decision as to the application of the Clause to be made on the basis of whether or not the substance of the communication is a matter properly publicly addressed by a legislator.

As will be demonstrated in the discussion of the extent of the congressional role in this nation's appropriation process which is contained in the portion of the brief which follows, it is clear that a legislator is properly within his purview in commenting on the expenditure of public funds. *Amici* wholeheartedly agree with the statement of the court below that "If the informing function, even though limited is to be accorded any absolute immunity, it must be in a case such as this." *Hutchinson* v. *Proxmire, supra* at 1033.

II. The Followup Telephone Calls Are an Integral Part of the Valid Exercise of the Congressional Oversight Function and Are Therefore Entitled to Protection Under the Speech or Debate Clause

The Court of Appeals below held that although the process of gathering information on public spending from administrative agencies was protected as "within the legislative sphere", *Hutchinson* v. *Proxmire,* 579 F. 2d at 1032, the phone calls placed by Senator Proxmire's staff to the agencies after award of the Golden Fleece encouraging termination of the research grants could not be accorded Speech or Debate protection. *Id.*[2]

The Court of Appeals reasoned that the contacts with the administrative agencies were "too far removed from the legislative sphere to be absolutely protected", *id.,* and cited for support the following language in *Gravel* v. *United States,* 408 U.S. 606, 625 (1972):

> "Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to administration of a federal statute—but such conduct, though generally done, is not protected legislative activity. *United States* v. *Johnson* decided at least this much."

[2] The court below nevertheless found that the follow-up calls were not actionable because they were protected First Amendment activity.

First, the language relied on by the Seventh Circuit is pure *dicta*; the issue faced by the Court in *Gravel* did not concern executive agency contracts by Members or staff; the precise controversy presented was whether an aide to Senator Gravel could be subpoenaed to appear before a grand jury investigating alleged criminal acts committed in relation to the gathering of classified documents which the Senator placed in the public record at a committee hearing which he chaired and arranged to be published, and whether a protective order entered by the district court proscribing certain categories of questions bearing on legislative matters was appropriate to effect the speech or debate protection, 408 U.S. at 608–610. Neither did the ruling in *Gravel* concern agency contacts by Members of Congress or their staff.

Amici submits that the follow-up telephone calls are an integral part of the legitimate legislative function and are at the core of the proper exercise of the power of Congress to direct the spending of money, and the concomitant and equally vital responsibility to supervise those expenditures. It is further submitted by *amici* that the nature and types of contacts with executive agencies at issue in this case do not come within the category of contacts which have been determined to be outside the "legitimate legislative sphere" by the Gravel *dicta* relied on by the Seventh Circuit or the *Johnson* decision to which it refers and from which it draws support.

As stated by defendant in the court below: "At heart the powers, and hence the business, of Congress

is control over the purse strings of Government." Brief for Defendant-Appellees at 22, *Hutchinson* v. *Proxmire, supra.* The Constitution itself places the responsibility for taxing and spending with the Congress alone:

> "The Congress shall have the Power to lay and collect Taxes, Duties, Imports and Excises . . ."

U.S. Const., art. I, § 8, cl. 1.

> ". . . No Money shall be drawn from the Treasury but in consequence of Appropriations made by law, and a regular statement and Account of the Receipts and Expenditures of all public money shall be published from time to time . . ."

Id. at § 9, cl. 7.

To view the legislative appropriations power delegated to Congress as consisting merely of the passage of laws directing the expenditure of money and the investigation of its uses, but as not encompassing the supervision and control represented by the follow-up telephone calls is an overly narrow and constricted interpretation of an essential power of Congress which is not supported by history, logic, precedent or case law. In a real sense, the appropriations process has no beginning and no end; it is a continuous function which spans calendar, fiscal and sessional periods. The contacts at issue here could as easily be viewed as preparation for the next year's appropriation to the agencies involved as oversight of the expenditures made in the current year.

Accordingly, this Court should reject the mechanistic and rigid approach adopted by the appeals

court and opt instead for a view which recognizes the unique constitutional and historical perspective in which the legislative appropriations power and the supervisory responsibility which it implies are placed so that Congress may continue to exercise these powers in an effective and vigorous manner.

The power to tax and spend, and the responsibility to oversee expenditures, were established early in the struggle between Parliament and the King as powers belonging to the representative branch of government.

> "The commons had become a regular element of Parliament because the king needed their money. It was in the area of taxation that Parliament first secured power over the kings. As early as 1297 we saw the principle enunciated that the consent of the community of the realm was necessary for all taxation save ancient aids and customs. This meant that the king could not levy direct taxes upon his subject without their consent and this came to be given in parliament."

B. Lyon, A Constitutional and Legal History of Medieval England 548 (1960).

However, the power of parliament over the purse strings of government as it developed did not stop at control over taxation.

> ". . . had parliament stopped at this point its victory would have borne no other fruit essential for controlling the king. *While it is very well to control taxation, those who approve it should receive something tangible in return for their money and obtain some guarantee that the money approved will be spent wisely and be*

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used for the welfare of the realm. Fortunately, parliament soon took interest in the purposes for which taxes were used and how they were expended."

Id. at 550 (emphasis added).

In addition, the parliament of the fourteenth century asserted the right to "appropriate the money granted so that it would be expended on specific projects and not commandeered by the king, his councillors, or his favorites for less important and frivolous purposes." *Id.* at 552.

It is this ancient and well established tradition of parliamentary control of and supervision over the raising and spending of money which served as the model for the "power of the purse" which the American constitution lodged in the Congress.

This Court has long recognized, as part of the legislative process, the inherent power to investigate and has described the power as "broad", *Watkins* v. *United States,* 354 U.S. 178, 187 (1957) and as encompassing *"inquiries concerning the administration of existing laws* as well as proposed or possibly needed statutes." *Id.* (emphasis added) No activity would appear to fall as squarely within the category of valid inquiry into the administration of existing laws than the follow-up contacts between Senator Proxmire's staff and the agencies administering the laws under which appropriations were made to them for specific research.

Moreover, these follow-up contacts could well provide information on the intention of the agency to

continue to fund plaintiff's research, a consideration which might weigh heavily in Senator Proxmire's decision either to take actions to reduce money to these agencies or more precisely circumscribe the kind of research permitted by law.[3]

Congress has, from the inception of the republic, exercised its oversight function through inquiries and

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[3] Congress frequently limits, through general administrative provisions, the amount, or manner in which, appropriated money may be spent. For example, a provision was included in an appropriation for the Department of Interior and related agencies for 1979 providing that none of the funds "shall be available to the Smithsonian Research Foundation", Pub. L. No. 95-465, 92 Stat. 1279, 1298 (Oct. 17, 1978); a provision was enacted as part of the appropriation for Department of Transportation and related agencies for 1978 providing that "[n]one of the funds provided in this act shall be available for the planning or execution of programs for any construction or improvements at Flushing Airport in New York City." Pub. L. No. 95-85, § 316, 91 Stat. 402, 417 (Aug. 2, 1977) and a provision in the Department of Defense Appropriation Act of 1978 states that "[n]one of the funds appropriated by this Act shall be available for any research involving uninformed or nonvoluntary human beings as experimental subjects." Pub. L. No. 95-111, § 840, 91 Stat. 886, 906 (Sept. 21, 1977). Scores of these types of prohibitory statutory provisions may be found in other appropriations laws. *See, for example,* Departments of State, Justice and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-431, §§ 103, 604, 606, 92 Stat. 1021 (Oct. 10, 1978) and Treasury, Postal, and General Government Appropriations Act, 1979, Pub. L. No. 95-429, § 2, 92 Stat. 1001, 1013 (Oct. 10, 1978). Almost all these provisions are a result of congressional oversight of agency administration of the kind performed by Senator Proxmire. Consequently, there would have been nothing to prevent Senator Proxmire from proposing a similar limit on the kinds of research funded by the agencies involved. In such case, the "follow-up" calls would be properly characterized as information gathering, and thereby immunized by the Speech or Debate Clause under *Gravel.*

examinations of the manner in which executive agencies and departments expend money appropriated by the Congress for specific purposes. The congressional power of appropriation implies a right of supervision over the expenditure of public moneys which makes an essential part of the legislative process contacts, both formal and informal, between agencies and Members of Congress responsible for appropriating money.

As early as 1800, Wolcott, Secretary of the Treasury, resigned due to criticism of his administration of that Department, and so informed the House. 10 Ann. Cong. 786–87 (1800). As a result, the House commenced an investigation to examine the state of the Treasury and the expenditures of public money. *Id.* at 796–97. In the course of its exhaustive investigation, the committee carefully scrutinized each and every account maintained in the Treasury, in relation to receipts and expenditures, loans of money, remittances and moneys advanced to individuals on account of current services. *Id.* at 980–986.

The House has always viewed the oversight function respecting the application of public moneys to their stated purposes to be an integral part of the legislative process. In proposing a resolution to commence an inquiry into whether advances had been made by the War Department to the Commander in Chief of the Army, contrary to law; the proponent of the resolution stated:

> "Among the duties—and among the rights, too—of this House, there is perhaps none so important as the control which it constitutionally possesses over the public purse. To what purpose is that control? The mere form of appropriating public money, unless this House rigorously examine into the application of the money thus appropriated; unless the House examine if the amount of appropriation is exceeded by the expenditure; or if it be misapplied, that is, if money appropriated for one object be expended for another; unless we do this, sir, our control over the public purse is a mere name—an empty shadow."

19 Ann. Cong. 1330–31 (1809) (remarks of Rep. Randolph).

Direct contacts with agencies, like those of Senator Proxmire's staff, have always been viewed as essential to the implied supervisory function attendant to the appropriating power of Congress and therefore within the "legitimate legislative sphere". To hold, as did the Court of Appeals below, that such contacts are outside the protection of the Speech or Debate Clause, is to deprive the supervisory power of vitality and ignores the overwhelming evidence that early Congresses viewed it as integral to the legislative appropriations process.

Other examples abound of early Congressional oversight of expenditures of public money by executive agencies.

In 1810, Representative Pearson of North Carolina offered a resolution to inquire into the conduct of Brigadier general Wilkinson based on allegations that he, while in the service of the United States, "corruptly received money from the Government of Spain,

or its agents, or in relation to having . . . been an accomplice . . . in a project against the dominions of the King of Spain . . ." 21 Ann. Cong. 1606–07 (1810). The central focus of the debate on the resolution revolved around the control by Congress of the public purse. In the course of this debate, the fundamental and inherent nexus between the spending and supervisory function were eloquently stated:

> "The true construction of the powers of this House in respect to investigation, other than for the purpose of impeachment, is this: We have, 1st, The power to inquire to inform ourselves and the nation; and 2d, The power to inquire with a view to future legislation. What are we? Legislators, possessing the sovereign power, and drawing from the people the money to support the Government. Being thus constituted, representing the people, and drawing from them the means of keeping up our establishments, have not the people a right to know not only how it is distributed, but to whom? Is it republican doctrine that the people should not know how thair [sic] money is distributed? You may as well say they have not a right to know how it is expended, as to refuse to inform them to whom it is given. I consider it a right of this House, and of the people, to know how their money is expended, and to whom it is given."

Id. at 1743 (remarks of Rep. Sheffey)

The inquiries made by Senator Proxmire in exercising Congressional supervision of the award of contracts by government departments also has its tap-

roots firmly in the history of the early Congresses. In 1820 and 1822 the administration of the Post Office Department was subjected to close scrutiny by the House, which adopted a resolution appointing a committee to investigate the affairs of the Post Office. H.R. Jour., 16th Cong., 2d Sess. 80 (1820). The committee reported to the House on a number of specific areas of inquiry, including "[w]hether the Postmaster General, in his annual reports to Congress of the contracts made by his department, has reported them conformably with law or not." 37 Ann. Cong. 1252 (1821). In relation to this subject, the Committee found that "the dates and duration of these contracts are not reported, which the law, in express terms requires." *Id.* at 1253.

The House has inquired into other areas, including whether money appropriated for the support of the army had been misapplied by General Jackson to raising troops without congressional authorization. 35 Ann. Cong. 717 (1819).[4] Although the Committee found that the disbursements under investigation were 'irregular and unauthorized", H.R. Rep. No. 72, 16th Cong., 1st Sess. 12 (1820), the committee declined to devise specific "legislative remedies against recurrence of these disorders" *id.*, and further concluded:

> "To prescribe the principles of the constitution by legislative enactments, might tend to impair its high and uncontrollable sanctions, and the faithful discharge of the duties of the several

[4] The resolution also provided that the committee could report legislation on the subject.

> committees of the House furnish an adequate remedy against all abuses in the public expenditure. The Committee therefore submit the facts contained in this report, and the documents which establish them, referring them to the discretion of the House."

Id.

This latter example is informative on the congressional perception of the proper exercise of the oversight function. While the expenditure and use of public money is clearly a subject on which "legislation [can] be had", *McGrain* v. *Daugherty,* 273 U.S. 135, 177 (1927), inquiries into executive department administrative decisions need not ultimately result in some form of specific legislation to constitute legitimate legislative activity. Accordingly, regardless of whether Senator Proxmire's follow-up calls were part of an overall effort to "legislate" control over the funds in question, they should nevertheless be accorded speech or debate treatment since Congress has historically employed continuous supervision of public expenditures as one way of implementing its Article I taxing and spending powers.

Congressional efforts to control appropriations have not been limited to the kind of *ad hoc* approach represented by these early examples.

In 1814, a Committee on Public Expenditures was formed to "examine into the state of the several public departments, and particularly into the laws making appropriations of moneys, and to report whether the moneys had been disbursed conformably with such laws." 4 A. Hinds' *Precedents of the House*

of Representatives, § 4315 at 831 (1907). The impetus behind the formation of this committee was a desire "to relieve the Committee on Ways and Means of some of its duties", *id.,* demonstrating that oversight over the expenditure of money by executive departments was considered important and distinct enough to demand the creation of a separate committee for that purpose.

Later, in 1816, the House created several Committees on Expenditures "when, the spirit of inquiry being aroused by 'clamours and suspicions' that had gone forth, Mr. Henry St. George Tucker of Virginia, proposed these committees, which had been found useful in England and in Virginia." *Id.* Significantly, these committees were established for a whole Congress instead of for a single session long before the custom of appointing standing committees for a whole Congress.

In 1946, as part of the Legislative Reorganization Act, provisions of law were adopted "to strengthen congressional surveillance of the execution of the laws by the executive branch." S. Rep. No. 1400, 79th Cong., 2d Sess. 6 (1946). Specifically, each standing committee, in order "[t]o assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it deems necessary . . . [shall] exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee." Pub.L. No. 79–601, § 136, 60 Stat. 832.

In 1970, the Congress determined that despite the specific responsibility for oversight devolved upon standing committees of the House, most remained primarily concerned with legislative programs.

> "In order to give new emphasis to this responsibility [legislative oversight] which would be redesignated 'legislative review', S. 844 would (1) restate the review functions of standing committees in broader and more comprehensive terms, specifically describing five major categories of continuing inquiry and study; (2) authorize each such committee to employ a review specialist as a member of its professional staff, in addition to those presently authorized, to assist the committee in the performance of its review functions; and (3) require all such committees to submit to their respective Houses, not later than March 31 of each year beginning after January 1, 1970, annual reports relative to review activities for subsequent transmission to the President and appropriate executive and judicial officers."

H.R. Rep. No. 91–202, 91st Cong., 1st Sess. 5 (1969) This proposal was adopted substantially as recommended. See H.R. Rep. No. 91–1215, 91st Cong. 2d Sess. 17 (1970).

Again, in 1974, the House Committee on Committees believing that despite previous legislation there remained "a wide gap between what is required by law and what is actually done", H.R. Rep. No. 93–916, 93d Cong. 2d Sess. 62 (1974) recommended the establishment of oversight subcommittees on all standing committees. The reporting committee premised the

need for these subcommittees on the proliferation of federal programs and agencies to respond to perceived national and international problems. It also stated that the review function was necessary to "eliminate executive waste and mismanagement", and ". . . insure that executive policies reflect national needs and goals", *Id.* The committee further declared that the oversight subcommittees would 'introduce into the Federal governmental process a check and balance whose need was unforeseen in an earlier and less complex day' ". *Id.* at 63 *quoting, Organization of Congress: Hearings before the Joint Committee on the Organization of Congress,* 89th Cong. 1st Sess. 688 (1965) (statement of Rep. Laird).

The House adopted the proposal to establish oversight subcommittees on all standing committees, H.R. Res. 988, 93rd Cong. 2d Sess. § 201 120 Cong. Rec. 34470 (1974) and these provisions are now incorporated in the rules. H.R. Rule X, cl. 2(b)(1), Rules of the House of Representatives, § 692(b) at 397, *reprinted in* H.R. Doc. No. 94–663, 94th Cong. 2d Sess. (1977).

The establishment of special oversight subcommittees for the precise and primary purpose of insuring that executive agencies spend appropriated money as directed by Congress is strong support for finding that congressional-executive agency contacts are within the ambit of the Speech or Debate Clause. Vigorous pursuit of oversight through congressionally created mechanisms is likely to be severely restricted by an interpretation that follow-up calls to agencies are un-

protected by the doctrine of legislative immunity. Although protected by the First Amendment under the appeals court's formulation, *Hutchinson* v. *Proxmire, supra* at 1034, Members of Congress vindicating an important legislative function should not be forced to determine at their risk first whether follow-up calls to an agency constitute protected First Amendment activity, particularly where any protection flowing therefrom is not absolute but dependent upon the absence of "malice" as defined in a vast expanse of case law.

In fact, two Supreme Court cases, decided the same day, have established that executive officers, who communicate to the Congress with respect to matters within their official duties are privileged under a judicially fashioned doctrine of official immunity. *Barr* v. *Matteo,* 360 U.S. 564 (1959) and *Howard* v. *Lyons,* 360 U.S. 593 (1959). In the latter case, the question presented was whether a naval officer, in command of the Boston Naval Shipyard, was privileged with respect to civil liability under Massachusetts law for alleged defamatory matter contained in a memorandum from the officer to his superiors, copies of which were sent to members of the Massachusetts Congressional delegation by his superiors. The Court ruled, based on the decision in *Barr* v. *Matteo, supra,* providing officers of the government a defense to civil damage suits for defamation as a result of performing official acts, that the sending of memoranda from the executive agency to Congress was in the discharge of official duties and therefore privileged. *Howard* v. *Lyons, supra* at 597–

598. It would be ironic indeed if the allegedly libelous statements on official matters flowing from executive branch officials to Members of Congress were privileged under a judicially created doctrine, but that communications flowing from Members of Congress to executive agencies in pursuance of the legislative appropriations oversight function were not privileged in the presence of an "explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause, U.S. Const., Art. I, 6." *United States* v. *Nixon,* 418 U.S. 683, 704 (1974).

This Court has without exception affirmed the power of Congress to investigate into the administration of executive departments, *McGrain* v. *Daugherty, supra* and *Sinclair* v. *United States,* 279 U.S. 263 (1927), and nothing in these cases indicates any basis for limiting the exercise of that power by denying protection to acts, which like the follow-up calls, are integrally related to the performance of the investigative function in the area of congressional appropriations. Nor is *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881), to the contrary. Whatever limits *Kilbourn* imposes, it does so only with respect to inquiries purely into what are deemed the personal affairs of individuals who hold no office in the government, a subject on which no valid legislation could be had and that decision, to the extent it retains its vibrancy, *see Hutcheson* v. *United States,* 369 U.S. 599, 613 n. 16 (1962), places no limitation whatsoever on inquiries into executive agency operations like those involved here.

In the hierarchy of legislative oversight, contact with administrative agencies occupies a position equal to both statutory proscription and hortatory committee report language. This is especially true with respect to the appropriations committees of Congress:

> "Beyond the letter of the appropriation bills it writes, the Committee is expected to pursue its oversight tasks in nonstatutory ways. The Committee holds hearings each year for the purpose of examining agency budget requests and questioning agency officials. Both "on" and "off" the record, ample opportunity exists for the Committee to scrutinize agency behavior and communicate legislative desires to the agency officials involved. Another oversight technique involves the intentions, admonitions, and directions conveyed to the agency by means of Committee reports. Ostensibly written to convey the reasoning behind the Committee's recommendation to the House, the criticisms and suggestions carried in the reports accompanying each bill are expected to influence the subsequent behavior of the agency. Committee reports are not the law, but it is expected that they be regarded almost as seriously. *A third nonstatutory method of oversight involves the informal contact, face-to-face or written, between individual Committee members and the Committee staff on the one hand and the chief executives and budget officers of executive agencies on the other. It is expected that Appropriations Committee influence, like that of all House committees, should be wielded in fairly continuous personal communication with executive agency personnel.*"

R. Fenno, The Power of the Purse: Appropriations Politics in Congress 18–19 (1966) (emphasis added).

The Senate recently issued a manual on oversight techniques for the purpose of acquainting Members and staff with the myriad means available to oversee the executive branch. The manual instructed both Senators and Representatives on methods of individual legislative oversight which might be utilized:

> "Very often, individual Senators or Representatives will conduct their own investigations. Studies may be conducted by a Member's personal staff with hearings possibly held in his home State or district; or the General Accounting Office or some other legislative agency or private research group might be directed to conduct an investigation of a matter for a Senator or Representative. Two examples will illustrate the utility of this device.
>
> A legislator, on his own initiative, can create an *ad hoc* committee to investigate agency responses to certain problems. For example, former Representative David Pryor (Ark.) introduced a resolution in 1971 to create a Select Committee on Aging. After the House Rules Committee, which has jurisdiction over such proposals, did not report the measure, and House leaders were unable to persuade the Rules chairman to send the proposal to the floor, Pryor rented three trailers and with the help of student volunteers held *ad hoc* hearings on the problems of the aged."

Congressional Oversight, Methods and Techniques, prepared for the Subcomm. on Oversight Procedures of the Senate Comm. on Government Operations by

the Cong. Research Service, Library of Congress and the General Accounting Office, 94th Cong., 2d Sess. 6 (Comm. Print 1977).

Clearly, Members do not themselves conceive of the Article I taxing and spending power as limited to voting appropriations on the Floor of the House and no more:

> "A lot of people I have talked to in Congress say this [appropriations budget process] is a waste of time; that Congress really ought to come here for about 3 to 6 months, set the budget limits for each area, and then leave and let the executive branch run this Government as they do anyway and that we really do not have the time or the capability to find out what in the world is going on in these programs, nor should we. We should simply say, Defense Department, you have x to spend, go spend it and we wish you well. . . . I do not think we can run this Government that way. I think we have a responsibility that we have to discharge."

Excerpts From Hearings on Congressional Procedures, Subcomm. on Rules and Organization, House Comm. on Rules, Subcomm. Print No. 96–01, 95th Cong. 2d Sess. 77 (1978) (statement of Rep. Gephardt).

Neither *Gravel* nor *Johnson*, as relied upon by the Seventh Circuit, dictate a holding that the agency contacts in this case are too far removed from the legislative sphere to be protected.

First, in *United States* v. *Johnson,* 383 U.S. 169 (1966), it was held that the Speech or Debate Clause

provided immunity to a Congressman from indictment and trial under a general conspiracy statute for conspiracy to defraud the government where proof of that charge involved inquiry into the motives and preparation of a speech given in the House. "The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and . . . this is precisely what the Speech or Debate Clause forecloses from executive and judicial inquiry." 383 U.S. at 180. But with regard to the other charges alleging improper intercession with the executive, the Court stated:

> "No argument is made . . . that the Speech or Debate Clause reaches conduct, such as was involved in an attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process."

Id. at 172.

The case presented here simply does not concern alleged improper intercession before executive agencies in violation of criminal statutes devised by Congress itself to protect executive decision making. Rather, it concerns *proper* contact of executive agencies by a Member in the context of the legislative process—the expenditure and use of public money. The follow-up calls can hardly be deemed improper in view of the holdings in *Barr* v. *Matteo, supra* and *Howard* v. *Lyons, supra* that executive officials are immune from suit in contacting Members of Congress about official acts in which they have an interest.

Accordingly, there is nothing, in the facts or the holding in *Johnson* which compels a finding that the

follow-up calls are outside the legitimate legislative sphere. As the above discussion indicates, the oversight role fulfilled through the calls is at the core of the legislative appropriations process and therefore the calls are entitled to the absolute protection provided by the Speech or Debate Clause.

And *Gravel* itself does not foreclose such a holding. As described earlier, *supra* at 13. *Gravel* concerned a protective order to shield the Senator's aide from questioning by a grand jury about the receipt of classified material in preparation for a committee hearing and the publication of that material through non-congressional channels.[5] "Cajoling" and "exhorting" of administrative officials was not at issue in *Gravel;* nor is it at issue here. Senator Proxmire and his staff, in fulfilling their congressional supervisory role were performing an integral and concomitant function under the taxing and spending power, a matter which the Constitution places within their jurisdiction.

For this Court to hold, particularly in the critical appropriations area, that inquiring and voting on spending decisions by executive agencies are protected, while oversight and supervision represented by the follow-up calls are not, will inevitably heighten

[5] The statement drawn from *Gravel* by the Seventh Circuit appears in the context of the Court's holding concerning the alleged arrangement to publish the classified material with a private non-congressional publishing entity. The Court concluded that "private publication by Senator Gravel . . . was in no way essential to the deliberations of the Senate." 408 U.S. at 625. *Amici* contend, as supported by the text of the brief, that Senator Proxmire's follow-up calls were an essential part of legislative deliberations.

the public perception that administrative agencies, created by and purportedly accountable to Congress, are beyond the reach of effective congressional control. Surely, to conclude that Members may "exhort" and "cajole" all they desire on the floor and in committee, where the impact and influence on agencies may be attenuated and sometimes even ignored, but that they are outside the legislative sphere when directly confronting those, through follow-up calls, who are responsible for complying with congressionally mandated intent, makes a mockery of the appropriations process and turns the Congress into a polite debating society where strong words may be used, but never implemented. *Amici* submit that these calls are "an integral part of the deliberative and communicative processes by which Members participate" *Gravel* v. *United States,* 408 U.S. at 625, in the business before them on the appropriation of public money; that the calls are "core" legislative and oversight activity; that they represent a legitimate and recognized method of exercising the Article I taxing and spending power and that for all these reasons are entitled to Speech or Debate protection.

CONCLUSION

In conclusion, the *amici* ask the Court to consider the importance, within the legislative and representative processes by which this nation is governed, of maintaining the ability of an elected legislator to inquire of executive department employees concerning the expenditure of public funds and to communicate

his analysis of such expenditures to the American public. The adverse impact which would occur if a legislator felt intimidated by suits such as the instant case is precisely one of the dangers which the framers of our Constitution sought to prevent by the inclusion of the unique privileges conferred on legislators in the Speech or Debate Clause of our Constitution. *Amici* submit that the framers were successful in that endeavor, and that the Clause, as interpreted by this Court, does bar the instant suit.

Respectfully submitted.

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MARCH 26, 1979.

U.S. GOVERNMENT PRINTING OFFICE: 1979